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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE JOAB URZUA,

Defendant and Appellant.

E049456

(Super.Ct.No. INF062704)

OPINION

APPEAL from the Superior Court of Riverside County. Jorge C. Hernandez,
Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Defendant Jose Joab Urzua, represented by counsel, pled guilty to one count of robbery (Pen. Code, § 211)¹ (count 1) with the personal use of a firearm (§§ 12022.53, subd. (b), 1192.7, subd. (c)(8)); one count of unlawfully transferring an access card (§ 484e, subd. (a)) (count 2); one count of receiving stolen property (§ 496, subd. (a)) (count 3); one count of obliterating the serial number on a firearm (§ 12090) (count 4); and two counts of unlawfully using an access card (§ 484g, subd. (a)) (counts 5 & 6). In return, defendant was sentenced to the indicated sentence of 12 years in state prison. Defendant appeals from the judgment. His notice of appeal challenges the sentence or other matters occurring after the plea, the validity of the plea, and the denial of his motion to strike the enhancement.

I

FACTUAL AND PROCEDURAL BACKGROUND²

On July 19, 2008, at approximately 2:30 a.m., the victims (Joseph and Yanez) were standing in a parking lot of a bar in Palm Desert, next to Joseph's vehicle talking, when a car driven by coparticipant Martinez approached. Defendant jumped out of the passenger's side of the vehicle, waved and pumped a shotgun at Joseph and Yanez, then took Joseph's purse, which was sitting on the trunk of her car. Defendant then said,

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The factual background is taken from the preliminary hearing transcript and the probation officer's report.

““Thank you,”” got back in the car, and drove away. Credit card purchases at a gas station and fast food restaurant were made with Joseph’s credit card.

Police eventually located defendant after he used Joseph’s cellular telephone. Personal property belonging to Joseph was discovered in a vehicle in which defendant was a passenger. Both victims identified defendant and Martinez in an in-field lineup. After defendant waived his constitutional rights, defendant admitted to robbing the victims, but he claimed that it was Martinez’s idea. Martinez also waived his constitutional rights. He admitted the shotgun was his, but then stated it was defendant’s idea to rob the victims because someone owed him some money. A search of defendant’s residence revealed an unloaded shotgun with its serial number removed, an iPod, a camera, and Joseph’s purse.

Following the preliminary hearing, on September 23, 2008, an information was filed charging defendant with one count of robbery (§ 211) (count 1) with the personal use of a firearm (§§ 12022.53, subd. (b), 1192.7, subd. (c)(8)); one count of unlawfully transferring an access card (§ 484e, subd. (a)) (count 2); one count of receiving stolen property (§ 496, subd. (a)) (count 3); one count of obliterating the serial number on a firearm (§ 12090) (count 4); and two counts of unlawfully using an access card (§ 484g, subd. (a)) (counts 5 & 6).

On May 18, 2009, defendant filed a motion to strike the gun enhancement or other equitable relief and supporting documents, arguing his privately retained counsel was ineffective for causing defendant an opportunity to lose a seven-year deal with the district attorney. Defendant further suggested that Martinez had received a two-year deal

because Martinez's "family friend" was a victim witness advocate employed by the Riverside County District Attorney's Office, and she had helped to negotiate Martinez's plea.³ Defendant argued that the prosecutor's failure to disclose this relationship constituted "unclean hands" thereby entitling him to equitable relief. Defendant also argued that the gun enhancement constituted cruel and unusual punishment. The People thereafter filed their opposition and supporting documents.

A three-day hearing on defendant's motion began on August 28, 2009. The court denied defendant's request to strike the gun enhancement based on cruel and unusual punishment. Following testimony from several witnesses, including defendant's prior trial counsels, Martinez's trial counsel, the deputy district attorney on Martinez's case, and defendant, the trial court denied defendant's ineffective assistance of counsel claim. The trial court also denied defendant's motion for equitable relief.

Defendant subsequently pled guilty as charged and admitted the gun use enhancement in exchange for an indicated sentence of 12 years in state prison. At the change of plea hearing, the court reviewed the plea form with defendant and asked defendant whether he had reviewed the form with his attorney and whether he understood the form, including his constitutional rights. Defendant replied in the affirmative. The court also asked defendant whether he agreed to waive his constitutional rights, and whether he understood the consequences of pleading guilty. After the court explained to defendant the consequences of pleading guilty, defendant replied in the affirmative.

³ Martinez was a juvenile at the time of the incident, and defendant was 19 years old.

Defendant also indicated that he was pleading guilty based on his own free will. The court found the guilty plea was entered into freely, knowingly, and voluntarily.

On October 2, 2009, defendant was sentenced to a total term of 12 years in state prison: the low term of two years for the robbery, plus a consecutive 10 years for the gun use enhancement. The remaining counts were either ordered to be served concurrently or stayed. Defendant was awarded 507 days of credit for time served.

On September 10, 2009, defendant filed a notice of appeal based on the sentence or other matters occurring after the plea. He also challenged the validity of the plea and the denial of his motion to strike the enhancement and for equitable relief. Defendant's request for a certificate of probable cause was granted.

II

DISCUSSION

Defendant appealed and, upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493], setting forth a statement of the case, a summary of the facts, potential arguable issues, and requesting this court undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, but he has not done so. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error.

Defendant has failed to show that his counsel failed to act in a manner expected of other reasonably competent attorneys, or that he had suffered prejudice as a result of his

counsel's competency. (*People v. Wash* (1993) 6 Cal.4th 215, 269; *Strickland v. Washington* (1984) 466 U.S. 668, 688 [104 S.Ct. 2052, 80 L.Ed.2d 674].) Defendant has also failed to show he was entitled to equitable relief.

The record shows that defendant was thoroughly advised of the rights being waived and the consequences of pleading guilty. There is substantial evidence to support the trial court's finding that the plea was knowing, intelligent, and voluntary. In addition, the sentence was authorized and was imposed in accordance with the terms of the plea agreement. (§§ 211, 12022.53, subd. (b).)

Moreover, we are persuaded from our independent review of the record that the 10-year enhancement imposed under section 12022.53, subdivision (b), for defendant's use of a shotgun does not constitute cruel and unusual punishment under the facts of this case. (*People v. Dillon* (1983) 34 Cal.3d 441, 477; *In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Felix* (2003) 108 Cal.App.4th 994, 999-1001.) Although defendant did not actually fire the shotgun and, therefore, did not engage in the most serious form of gun use, he nevertheless used the shotgun to accomplish the robbery.

We have completed our independent review of the record and find no arguable issues.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.